BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS EIGHTH CIRCUIT.

OPINIONS.

Findings of Facts and Conclusions of Law on the Petitioner's Plea in Bar were made by the Honorable John Caskie Collet, District Judge, Eastern and Western Districts of Missouri and filed November 5, 1940. They have not been officially reported, but appear in the record, pages 40 to 44 inclusive.

The opinion of the Circuit Court of Appeals (Circuit Judges Gardner, Woodrough and Johnsen, Judge Gardner writing) was filed July 8, 1941. It has not yet been officially reported, but apppears in the record on pages 65 to 70 inclusive.

GROUNDS UPON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED HEREIN.

The grounds upon which Petitioner seeks to invoke the jurisdiction of this Court are fully set out at pages 22 to 23 inclusive of the Petition to which this brief is appended and reference is hereby made thereto. Therefore, said grounds will not be restated here.

STATEMENT OF THE CASE.

The case has been fully stated in the Petition and reference is here made to the Summary Statements in the Petition and to the Question Presented as set forth therein for a statement of the case.

SPECIFICATION OF ASSIGNED ERRORS.

I.

The Circuit Court erred in affirming Petitioner's conviction for violating the Liquor Enforcement Act of 1936 because the undisputed evidence showed that the State of Kansas did not prohibit all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume.

II.

The Circuit Court erred in affirming Petitioner's conviction for a violation of the Liquor Enforcement Act of 1936 because the Liquor Enforcement Act of 1936 is unambiguous as to the States affected by it and therefore the Circuit Court erred in considering the Congressional Report and the history of the Act in order to construe the unambiguous statute as to the States affected by it.

III.

The Circuit Court erred in affirming the Petitioner's conviction for a violation of the Liquor Enforcement Act of 1936 by departing from the record and considering evidence that was not in the record and which could not properly be considered a matter of judicial knowledge.

POINTS AND AUTHORITIES.

I.

The Liquor Enforcement Act of 1936 is not ambiguous as to its definition of the States affected by it, i. e., those States which prohibit all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume.

See Analysis of Section 3 of the Liquor Enforcement Act of 1936 in Argument, pages 31 to 40 inclusive.

Also, *Arnold v. United States,* 115 Fed. (2d) 525; *Gregg v. United States,* 116 Fed. (2d) 609.

II.

The various District Courts disagreed as to whether the Liquor Enforcement Act of 1936 applies to the State of Kansas.

See *United States v. Robason,* 38 Fed. Supp. 991.

United States v. Arnold, 38 Fed. Supp. 863;

United States v. 1940 Model Dodge Coupe, Unreported, pertinent portion of the opinion being set out at pages 43 to 45 inclusive of this brief.

III.

Disregarding the difference between the Federal and Kansas statutes creates a Federal offense by construction probably contrary to the applicable decisions of this Court.

United States v. Resnick, 299 U. S. 207, 81 Law Ed. 127.

IV.

Construing an unambiguous statute on the point involved herein is probably in conflict with the applicable decisions of this Court.

United States v. Wiltberger (5 Wheat.) 18 U. S. 76, 95-96;

Merritt v. Welsh, 104, U. S. 694, 702-703;

Hamilton v. Rathbone, 175 U. S. 414, 419;

Thompson v. United States, 246 U. S. 547, 550.

V.

Where the Circuit Court in a case on appeal makes its independent investigation of the facts from sources outside the record and reaches a conclusion contrary to the undisputed evidence upon the question, contained in the record, it has departed from the usual and accepted course of judicial

proceedings and its independent conclusion cannot be sustained on the grounds of judicial notice.

Edwards v. United States, 61 Sup. Ct. Rep. 669, 81 Law. Ed. 563;

Brown v. Piper, 91 U. S. 37, 42-43.

ARGUMENT.

GENERAL STATEMENT.

The question involved embraces four fundamental propositions.

They are:

1. The Liquor Enforcement Act of 1936 provides unambiguously that it applies only to such States as prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

2. The State of Kansas only prohibits all sales of intoxicating liquor containing more than 3.2 per cent of alcohol by weight.

3. A measurement of 3.2 per cent of alcohol by weight will always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume.

4. A consideration of the Report of the Committee on the Judiciary of the House of Representatives furnishes grounds for the inference that the Committee believed and therefore, possibly Congress, itself, believed, at the time it passed the liquor Enforcement Act of 1936, that a measurement of 4 per cent of alcohol by volume was identical with a measurement of 3.2 per cent of alcohol by weight.

Propositions two, three, and four have been demonstrated in the Petition. We will here, first demonstrate proposition one before addressing ourselves to the question as to whether this Court should grant the writ prayed for in the Petition.

THE LIQUOR ENFORCEMENT ACT OF 1936 IS NOT AMBIGUOUS AS TO ITS DEFINITION OF THE STATES AFFECTED BY IT.

GENERAL STATEMENT.

The Liquor Enforcement Act of 1936 was designed to enforce the twenty-first Amendment to the Constitution of the United States and thereby to protect "dry" States against liquor law violations directed from outside their borders.

"Dry" States were defined by the Act to be those States which prohibited all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

ANALYSIS OF SUBSECTION (A) OF SECTION 3 OF THE LIQUOR ENFORCEMENT ACT OF 1936.

That Congress accomplished this purpose is immediately apparent from an analysis of Subsection (a) of Section 3 of the Act, which, stripped of all unnecessary verbiage for the purpose of considering what States are affected by the Act, that is to say, what States are "dry" States, is as follows:

> "Whoever shall import * * * any intoxicating liquor into any State in which all sales (except for scientific * * * etc., * * * purposes) of intoxicating

liquor containing more than 4 per centum of alcohol by volume are prohibited * * * or attempt so to do * * * shall * * * be guilty of a misdemeanor * * * ."

Consideration of the foregoing shows clearly and indisputably that the States affected by the Act are such States, and only such States, as prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

CONSIDERATION OF THE PURPOSE OF THE OTHER MATERIAL IN SECTION 3.

Is this definition of a "dry" State altered or rendered ambiguous by any other provision of the Act?

We think not. To answer this question, it is perhaps well to now consider the Act as a whole. When this is done, it will be seen that the Act is clear, well integrated and unambiguous. Nothing is amiss and, except for the fact that portions of the Committee's Report (which portions will hereinafter be commented upon) indicate that the Committee believed that "4 per cent by volume" and "3.2 per cent by weight" were synonymous terms, the Congressional intent is clear from a reading of Section 3 of the Act.

As pointed out above, the Act was designed to enforce the twenty-first Amendment and to protect "dry" States from liquor law violations directed from outside their borders. Further, it was drafted with the policy of the twenty-first Amendment in mind—that the Federal Government would not impose a more drastic prohibition upon the various States than the States themselves wanted. Also, Congress had in mind the practical dif-

ficulties of enforcing the Liquor Enforcement Act. It had in mind that practically all States which would want to be "dry" States permitted the sale of intoxicating liquor for scientific, medicinal, mechanical and sacramental purposes. Further, it had in mind that some States might prohibit the sale for beverage purposes of intoxicating liquor containing less than 4 per cent of alcohol by volume.

If all these things are borne in mind in examining Section 3 of the Liquor Enforcement Act of 1936, it will be observed that said section is clear, well integrated and, what is more important here, that there is nothing in the section which in any way throws doubt upon the perfectly apparent intention of the Act, as noted above:—That the Act applies only to such States as prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

We may further test the question of whether or not the 4 per cent provision of Subsection (a) is rendered ambiguous by any other provision of Section 3 by asking a few questions and examining Section 3 to find the answer to them. Thus:

Is It Necessary for a State to Prohibit all Sales of Intoxicating Liquor Containing More Than 4 per cent of Alcohol by Volume Before it Comes Within the Protection of The Liquor Enforcement Act of 1936?

Answer: No, Subsection (a) provides:

"Whoever shall import * * * any intoxicating liquor into any State in which all sales (except for scientific, * * * etc. * * * purposes) of intoxicating liquor containing more than 4 percentum of alco-

hol by volume are prohibited * * * shall be guilty * * *."

Therefore, any State which prohibits all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume is, if otherwise qualified, within the protection of the Act. It may permit sales of intoxicating liquor containing any per cent of alcohol for scientific, sacramental, medicinal or mechanical purposes without imparing its right to protection under the Act.

Is a State Required to Prohibit All Importation of Intoxicating Liquor Into Its Boundaries in Order to be Within the Protection of the Act:

(a) If the Importation is For Scientific, Sacramental, Medicinal, or Mechanical Purposes?

(b) If the Importation is For Beverage Purposes?

Answer: The Act does not require a State to prohibit any kind of transportation of intoxicating liquor in order to have the protection of the Act. All that is required is that a State prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume. A State can permit the importation of intoxicating liquor containing any per cent of alcohol for either beverage, scientific, sacramental, medicinal or mechanical purposes and still be within the protection of the Act, provided it establishes a licensing or permit system for the importation of such intoxicating liquor as it permits to be imported.

Thus, the Act says:

> "Whoever shall import * * * any intoxicating liquor into any State in which all sales (except for scientific * * * etc., * * * purposes) containing more than 4 percentum of alcohol by volume are prohibited * * * shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such state * * * be guilty * * * ."
> *Dunn v. United States,* 98 Fed. 2d 119 (C.C.A. 10).

If a State Prohibits all Sales for Beverage Purposes of Intoxicating Liquor Containing More Than 4 Per Cent of Alcohol by Volume, Must it Establish a License System for the Importation of Intoxicating Liquor in Order to be Within the Protection of the Act?

Answer: No. If a State permits the importation of any intoxicating liquor for beverage purposes, or otherwise, it must establish a licensing system for such importation even though it is a 4 per cent state in order to have the protection of the Act. But, if a State is a 4 per cent State and if it prohibits all importation of intoxicating liquor, it is within the protection of the Act even though it has no permit system for the importation of intoxicating liquor.

Thus, the Act says:

> "Whoever shall import * * * any intoxicating liquor into any State in which all sales (except for scientific * * * etc., * * * purposes) of intoxicating liquor containing more than 4 percentum of alcohol by volume are prohibited * * * shall * * * (2) if all importation * * * of intoxicating liquor into

such State is prohibited by the laws thereof; be guilty * * * ."

If a State Prohibits the Sale for Beverage Purposes of All Intoxicating Liquor Containing More Than 4 Per Cent of Alcohol by Volume and Defines Intoxicating Liquor as All Alcoholic Beverages Containing More Than 4 Per Cent of Alcohol by Volume and Has a Licensing or Permit System for Such Intoxicating Liquor as it Permits to be Imported:

(a) Is it a Violation of the Act to Import Without a Permit Intoxicating Liquor Containing Only 4 Per Cent or Less of Alcohol by Volume?

(b) Would it be a Violation of the Act to Import, Without a License, Intoxicating Liquor Containing 5 Per Cent of Alcohol by Volume, if the Tryor of the Facts—The Court or Jury—Should find that Such Intoxicating Liquor was not Intoxicating in Fact?

(c) If the Situation is Otherwise as Stated in the Preamble of this Question, Except that the State in Question Defines Intoxicating Liquor as all Alcoholic Beverages Containing more than One Half of 1 Per Cent of Alcohol by Volume Would it be a Violation of the Act to Import into a State Intoxicating Liquor Containing Only 4 per cent of Alcohol by Volume Without a Permit from the State so to do?

(d) If the Situation were Otherwise as Stated in the Preamble to this Question, Except that the State in Question Prohibited all Sales of Intoxicating Liquor Containing More than One Half of 1 Per Cent of Alcohol by Volume and Defined Intoxicating Liquor as all Alcoholic Beverages Containing More than One Half of 1 Per Cent of Alcohol by Volume, Would it be a

Violation of the Act to Import into such a State, Without a Permit, Intoxicating Liquor Containing 1 Per Cent of Alcohol by Volume Even Though the Tryor of the Fact should Find that such Intoxicating Liquor was not Intoxicating in Fact?

Answer to Question (a):

It is no violation of the Act because Subsection (b) provides that to determine whether one transporting intoxicating liquor into a State is acting in violation of the Act, "the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor [i. e., the intoxicating liquor as defined by the laws of such State] (except for scientific * * * etc., * * * purposes) are prohibited in such State."

Since the liquor in question (a) contains only 4 per cent of alcohol by volume and since the laws of the State in question, as assumed in said question, prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume and define intoxicating liquor as all alcoholic beverages containing more than 4 per cent of alcohol by volume the application of the laws of the State to intoxicating liquor being transported, as stated in the question, shows that the sale of intoxicating liquor containing 4 per cent of alcohol by volume is not prohibited. Therefore, no license is required to import 4 per cent by volume intoxicating liquor into the State.

Answer to question (b):

It would be a violation to transport the intoxicating liquor even though it was not intoxicating in fact, as

stated in the question because the State prohibits all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume and applying the State's definition of intoxicating liquor, the intoxicating liquor here being transported is intoxicating liquor within the State's definition, the sale of which is prohibited by the laws of the State.

Answer to Question (c):

Here there would be no violation of the Act because, while the State prohibits all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume, and is as respects this matter, within the protection of the Act, and while the intoxicating liquor being transported is intoxicating liquor within the meaning of the State law, still, since the State does not prohibit all sales of intoxicating liquor as defined by its laws, it is found that there is no violation of the Act when the State's definition is applied to the liquor being transported "only to the extent that sales of such intoxicating liquor (except for scientific * * * etc., * * * purposes) are prohibited in such State."

Answer to Question (d):

Where the State defines intoxicating liquor as all alcoholic beverages containing more than one-half of 1 per cent of alcohol by volume and prohibits the sale of intoxicating liquor for beverage purposes and has established a licensing system for the importation of such intoxicating liquor as it permits to be imported, it would be a violation of the Act to transport intoxicating liquor containing 1 per cent of alcohol by volume into such State, even though the transported liquor was

not intoxicating in fact, because in applying such State's definition of intoxicating liquor "to the extent that sales of such intoxicating liquor (except for scientific * * * etc., * * * purposes) are prohibited in such State," it is found that the intoxicating liquor being transported is intoxicating liquor under the laws of the State, the sale of which is prohibited.

If the State Prohibits All Sales of Intoxicating Liquor Containing More Than 4.2 Per Cent of Alcohol by Volume and Defines Intoxicating Liquor as All Alcoholic Beverages Containing More Than 4.2 Per Cent of Alcohol by Volume, Is it a Violation of the Act to Transport Whiskey into the State Without a Permit so to do?

Answer: Applying the State's definition of intoxicating liquor to the whiskey being transported shows that the whiskey is intoxicating liquor under the laws of the State into which it is transported. Also, applying the State's definition to the whiskey, it is intoxicating liquor, the sale of which is prohibited by the laws of the State. But still, there is no violation of the Act. The condition of Subsection (a) has not been complied with. The State has not prohibited all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume. Hence, the Act is no more applicable to that State than it would be if the State did not prohibit all importation of intoxicating liquor and had failed to provide for a licensing system for the importation of intoxicating liquor which it did permit. *Dunn v. United States,* 98 Fed. 2d 119 (C.C.A. 10.)

CONCLUSION AS TO THE PROPOSITION THAT THE LIQUOR ENFORCEMENT ACT OF 1936 IS NOT AMBIGUOUS AS TO ITS DEFINITION OF THE STATES AFFECTED BY IT.

The foregoing demonstrates that the Liquor Enforcement Act of 1936 is not ambiguous as regards its definition of the States affected by it. Thus, by analysis of Subsection (a) of Section 3 it has been shown that the States protected are those, and only those, which prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume. Further, it has been shown that there is nothing further in the Act which in any way modifies the 4 per cent provision of Subsection (a). This has been done by considering piece by piece, so to speak, the other material in the Act and thereby showing that such material did not change the 4 per cent feature of Subsection (a) and further showing thereby that such material had a definite purpose in meeting the varied situation to which the Act might be required to apply.

Thus the 4 per cent feature of Subsection (a) is not ambiguous.

ARGUMENT IN SUPPORT OF THE GRANTING OF THE PETITION FOR CERTIORARI.

GENERAL STATEMENT.

In the Petition, we have set out the evidence from which it appears that the trial Court could have made no other Finding but that a measurement of 3.2 per cent of alcohol by weight would always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume. (p. 9-18.)

In the preceeding section of this brief, we have pointed out the reasons why the Liquor Enforcement Act of 1936 is unambiguous as to its definition of the States protected by it, i. e., States which prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

The Kansas statutes dealing with the prohibiting of the sale of intoxicating liquors are set out in the Circuit Court's opinion. (R. 67). These statutes show that Kansas only prohibits all sales for beverage purposes of intoxicating liquor containing more than 3.2 per cent of alcohol by weight.

The portion of the report of the Judiciary Committee of the House of Representatives which indicates that the Committee believed that the terms "4 per cent by volume" and "3.2 per cent by weight" provided for identical measurements is set out in the opinion of the Circuit Court (R. 69 para 3).

Thus, are established, the four basic propositions of the question involved, to-wit:

1. The Liquor Enforcement Act of 1936 provides unambiguously that it applies only to such States as prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

2. The State of Kansas only prohibits all sales of intoxicating liquor containing more than 3.2 per cent of alcohol by weight.

3. A measurement of 3.2 per cent of alcohol by weight will always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume.

4. A consideration of the Report of the Committee on the Judiciary of the House of Representatives furnishes grounds for the inference that the

> Committee believed and therefore, possibly Congress itself, believed, at the time it passed the Liquor Enforcement Act of 1936, that a measurement of 4 per cent of alcohol by volume was identical with a measurement of 3.2 per cent of alcohol by weight.

These propositions having been established, we come now to the consideration of the reasons urged for the granting of the writ herein.

1. THE CONFLICT ON THE QUESTION BETWEEN THE DISTRICT COURTS.

The case of *United States v. Robason,* (D. C. Kan.) 38 Fed. Supp. 991, holds that the Liquor Enforcement Act of 1936 applies to the state of Kansas and then points out at page 995 the conflict between the District Courts as set out heretofore in the Petition (p. 24).

This conflict between the District Courts in and of itself is not sufficient reason for the issuance of the writ herein. However, it does shed some light upon the importance of the question involved. Further, a consideration of the opinions of the various District Courts, published and unpublished, in connection with a consideration of the Circuit Court's opinion in the instant case, throws further light upon the importance of the question involved herein. The Circuit Court's opinion does not specifically point out the possible variations from 4 per cent of alcohol by volume where an alcoholic beverage contains 3.2 per cent of alcohol by weight. However, the two District Court opinions on the question, which have been published, *United States v. Arnold,* (D. C. West. Dist. of Mo.) 38 Fed. Supp. 863 and *United States v. Robason,* (D. C. Kan.) 38 Fed. Supp. 991, do mention the variation.

Thus, the Honorable Albert L. Reeves, District Judge, stated in *United States v. Arnold,* supra, 864:

> "Now, then, the state of Kansas says that above 3.2 per cent of alcohol by weight is intoxicating. 3.2 per cent by weight, as I understand, would equal four per cent by volume, 4.6, 4.8 or 4.9 or maybe 4.16 or 4.29 per cent on beer. * * * So that the state of Kansas provides that beer containing 4.15 per cent or 4.16 per cent by volume is not intoxicating. That is what the law of Kansas provides under all this testimony."

The Honorable Richard J. Hopkins, District Judge, in *United States v. Robason, supra,* quotes the Findings of Fact made by Judge Collet in the instant case especially Finding of Fact No. 5 at page 995.

Thus, although the Circuit Court's opinion herein only refers to the variation between the two measurements by stating that the trial Court found in effect upon substantial evidence "that an alcoholic beverage containing 3.2 per cent of alcohol by weight will contain approximately 4 per cent of alcohol by volume," the Arnold and Robason cases, supra, state the variation in specific terms, which at least tend to show what the Circuit Court meant by the use of the term "approximately" in its opinion.

In the case referred to by Judge Hopkins, in his opinion in the Robason case, supra, at page 995, United States v. 1940 Model Dodge Coupe, Motor No. D14-191545,No. 674 (D. C. West. Dist of Mo.), the opinion in which is unreported, Honorable Merrill E. Otis, District Judge, said:

> "The Court: It seems to me that the question presented here is quite a simple question. I am

very familiar, of course, with the case which was presented recently to the Court of Appeals since I sat on the Court of Appeals in that case." [*Arnold v. United States,* 115 Fed. 2d 525] "That was a criminal case in which the defendant had been found guilty of a violation of the Act of Congress and in which the only question that troubled the Court was whether the Act of Congress applied to Kansas. And that is the only question that is presented in the case here."

* * * *

"The statute, that is the federal statute, says, 'Whoever shall import, bring, or transport any intoxicating liquor into any state in which all sales of intoxicating liquor containing more than four percentum of alcohol by volume are prohibited, shall, except under certain circumstances'—with which we are not concerned here—'be guilty of a misdemeanor.' 'Whoever shall import, bring, or transport any intoxicating liquor into any state in which all sales of intoxicating liquor containing more than four percentum of alcohol by volume are prohibited, shall be guilty of a misdemeanor.'

"The only question is, is Kansas a state in which all sales of intoxicating liquor containing more than four percent of alcohol by volume are prohibited? If it is such a state, then the law applies to Kansas and the plaintiff should prevail in this proceeding. If it is not such a state, then the law does not apply to Kansas and the plaintiff cannot prevail in this proceeding.

"Why Kansas, when it enacted its intoxicating liquor laws, if it desired, as it said it did in so many words, to take advantage of the Federal Act, did not prohibit the sale in that state of all intoxicants containing more than four percent of alcohol by volume, I do not know. Perhaps it is because Kansas always does things in its own way. It prohibited sales of intoxicating liquors containing more than 3.2 percent of alcohol by weight.

"Now, the question is, are they the same thing? Well, that is a matter that only can be determined by investigation and research and evidence."

* * * *

"The difficulty with the Government's position is that, considering standard beverages, beer, for example, the testimony of the expert called by the Government, it appears, it seems to me, shows conclusively that it cannot be said that Kansas prohibits all sales of intoxicating liquors containing four per cent or more than four percent by volume. The witness for the Government has testified that as to beer, as to two grades of beer about which he gave testimony, 3.2 per cent by weight was equivalent in the case of one grade of beer to 4.07 by volume, and in the case of another grade of beer, to 4.16 by volume. Very obviously any beer which fell between four percent and 4.07 or 4.16 per cent is not prohibited, the sale of that beer is not prohibited in Kansas."

* * * *

"I conclude as a matter of law, upon the testimony introduced here, that the State of Kansas did not at the time of the transportation referred to and the seizure, prohibit all sales of intoxicating liquors containing more than four percent by volume and that, therefore, the use of the automobile in question was not in violation of the federal law, and that its seizure was not justified under the law."

2. DISREGARDING THE DIFFERENCE BETWEEN THE FEDERAL AND KANSAS STATUTES CREATES A FEDERAL OFFENSE BY CONSTRUCTION.

As pointed out in the Petition, the basis of the Circuit Court's decision cannot be laid hold of and assigned to one legal proposition alone. (p. 21.) The opinion seems

to be bottomed upon three different legal principles. (p. 21) Hence, each possible principle involved must be discussed.

If the Circuit Court considered the difference between the measurements legally inconsequential and affirmed the Petitioner's conviction upon that ground, it extended a Federal criminal statute to facts not clearly within the statute and thereby created a Federal offense by construction.

This Court has held that Federal criminal statutes must be strictly construed; that they cannot be extended to cover offenses not clearly within the statute; and that Federal offenses cannot be created by construction.

This rule has been announced by this Court innumerable times. Probably one of the most recent announcements by the Court upon this subject is in *United States v. Resnick,* 299 U. S. 207 where it was said:

> (Syl. 2, 3, and 4).
>
> "2. Statutes creating crimes are to be strictly constructed in favor of the accused and may not be held to extend to cases not covered by the words used."
>
> "3. The plain words of a statute must be given a meaning naturally attributable to them."
>
> "4. Before one may be punished for violating a statute it must appear that his case is plainly within the statute; there are no constructive offenses."

This principle is well founded in our law and abundantly supported by authorities.

In *United States v. Ragsdale,* (Hempst. 479, Fed. Cas. 16,113, 27 Fed. Case 684, 686) District Judge Johnson writing the opinion, it was said:

> "It has, however, been earnestly contended on the part of the United States by the District Attorney, that even admitting that the letter and words of the treaty apply to and embrace the defendant's case, that it is clearly not within the spirit and intention of the treaty. It is a sound rule in the construction of penal statutes, that if the case of the accused is clearly within the letter of a statute in his favor, the Court will rarely, if ever, take his case out of it, upon the ground that it is not within the spirit and intent of the Act."

Thus, if the basis of the Court's decision was that the variation between the two measurements was legally inconsequential, its decision was probably in conflict with the applicable decisions of this Court upon a Federal question.

3. IF THE CIRCUIT COURT'S DECISION IS BOTTOMED UPON THE CONSTRUCTION OF AN UNAMBIGUOUS STATUTE, IT DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

If the Circuit Court's decision is bottomed on the fact that its examination of the Congressional Report and the history of the Act convinced it that Congress intended the Act to apply to states which only prohibited all sales of intoxicating liquor containing more than 3.2 per cent of alcohol by weight and that it would therefore thus construe the Act, it, by contstruing an unambiguous statute, as regards the states affected by the Act, decided an important Federal question which has not but should be decided by this Court and further de-

cided it in such a way as to be probably in conflict with the applicable decisions of this Court.

The Circuit Court's decision is probably in conflict with these decisions: This Court said in *United States v. Wiltberger* (5 Wheat) 18 U. S. 76, 95-96, 5 Law Ed. 37, 42:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."
>
> * * * *
>
> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

This Court said in *Merritt v. Welsh,* 104 U. S. 694, 702-703, 26 Law Ed. 896-899

> "But in making its election, Congress did not leave any room for doubt as to its meaning. It used apt words to express it; terms free from all am-

> biguity and obscurity. If the test adopted fails to affect the desired object, the inconvenience or loss to the treasury need only be temporary; it can be changed at any moment. And it is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words and seeks to spell out or guess at the supposed intent of the Legislature, contrary or supplementary to that which is clearly embodied in the words it has used."

To the same effect are: *Hamilton v. Rathbone,* 175 U. S. 414, 419 and *Thompson v. United States,* 246 U. S. 547, 550.

In *Lansdown v. Faris* (C.C.A. 8) 66 Fed. (2d) 939 943, where the Circuit Court was urged to depart from the express words of the statute and construe the statute, relying upon material found in the debates of Congress, the Court pointed out that before it could look elsewhere for the legislative intent than to the statute itself, it must first find the statute ambiguous, pointing out that the rule applied "whatever may have been in the minds of individual members of Congress" (*Merritt v. Welsh,* 104 U. S. 694, 702) and then the Circuit Court epitomized the rules in the following language:

> "These rules of construction are not mere academic precepts. They go as deeply as the division of our form of government into three branches. It is the duty of the legislative branch to write the law. It is the duty of the judicial branch to take the law as so written. Whenever the judiciary changes that law—through construction or otherwise—it invades a domain prohibited to it and reserved solely for the legislative branch."

Hence, if the Circuit Court's decision is bottomed upon its construction of Section 3 of the Liquor Enforcement Act construed in connection with the Committee's Report, its decision is probably in conflict with the applicable decisions of this court.

4. THE CIRCUIT COURT'S INDEPENDENT INVESTIGATION OF THE DIFFERENCE BETWEEN THE TWO MEASUREMENTS, "3.2 PER CENT BY WEIGHT" AND "4 PER CENT BY VOLUME."

If the Circuit Court reached a conclusion from its independent investigation different from a conclusion that would be justified by considering the testimony of the three chemists, contained in the record, on the relationship of the two measurements, it would not be justified in affirming the Petitioner's conviction upon the results of its independent investigation. All the more would this be true where the Court has not set out specifically the information which its investigation revealed. The Circuit Court's opinion states, to be sure, that it found certain scientific treaties, which are named in the opinion, which were "to the effect that 4 per cent of alcohol by volume and 3.2 per cent of alcohol by weight are substantially identical" but neither the language used in said treaties nor the page numbers where the material may be found is set out. It is not likely, if there had been other evidence upon the subject than that given in the trial Court, that the Government would have failed to produce it.

Also, in fairness to the Circuit Court, it should be said that we do not construe its opinion as being bottomed upon its own investigation of the facts. However,

the opinion does indicate that the Court placed some reliance upon its independent investigation.

Insofar as its affirmance of the Petitioner's conviction was based upon its independent investigation, the Circuit Court departed from the accepted and usual course of judicial proceedings.

The only facts that can properly be before an appellate Court in a case in which it is exercising its appellate jurisdiction are those contained in the record and such facts as it may know judicially. *Edwards v. United States,* 61 Sup. Ct. Rep. 669.

If it is sought to sustain the Circuit Court's independent investigation of the facts on the grounds of judicial knowledge, then the decision is most certainly in conflict with applicable decisions of this Court.

If the Circuit Court's decision is bottomed upon its independent investigation of the facts, then it must be assumed that the investigation revealed facts different than those conclusions that could properly be drawn from the testimony of the three chemists who testified. Such a result could not be judicial knowledge under the decisions of this Court.

Thus, in *Brown v. Piper,* 91 U. S. 37, 42-43, 23 Law Ed. 200, 202 this Court said:

> "This power [of courts to take judicial knowledge] is to be exercised by the courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt on the subject should be resolved promptly in the negative."

Further, while it might be possible that the correct facts might not have been elicited in the trial Court, the

fact that the same facts were developed in the case of United States v. Robason; United States v. Arnold and United States v. 1940 Model Dodge Coupe, all supra would indicate that the difference between the two measurements as established in the trial Court in this case was correct.

CONCLUSION.

The evidence set forth in the Petition shows that the only conclusion that may be drawn as to the relation between the two terms under consideration is that a measurement of 3.2 per cent of alcohol by weight will always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume. The difference ranges from .007 per cent in the case of alcohol and water alone to .9 per cent in the case of special concoctions. Beer will vary from .05 per cent to .2 per cent.

While it may be appropriate under some circumstances to refer to these two measurements as approximately the same, it cannot justly be done under the circumstances of this case. Thus, the Circuit Court has created a Federal offense by construction.

If the Circuit Court's decision is justified on the ground of its construction of the Act, then, in construing an unambiguous statute, it has run contrary to many decisions of this Court. Likewise, if the decision of the Circuit Court is explained as resulting from its independent investigation of the facts.

For these reasons then, it is respectfully suggested that the prayer of the Petition should be granted and that a writ of certiorari should issue herein.

Respectfully Submitted,

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